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Supreme Court, U.S.
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No. 93-1910

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

KENDALL H. BREEDLOVE,

Petitioner

v.

CALVIN W. PHILLIPS, *et al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT FOR CERTIORARI

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August 30, 1994

36 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should the Court propound a standard for judicial use in applying the original and updated, *Doehr*-versions of the three-part test for constitutional Due Process of *Mathews v. Eldridge*, 424 US 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976)[1]?

2. Should the Court propound an augmented fourth part to the three-part *Mathews* test for private-party-initiated deprivations—to consider security safeguards against *malicious* abuse or perversion of law to unwarranted ends: (a) the predeprivation safeguards against *malicious* deprivation, including the procedures for deterring malicious abuse, and (b) the postdeprivation safeguards against *malicious* deprivation, including the procedures: (1) for swiftly setting right the malicious deprivation, and (2) for redressing the damages?

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[1] The *Mathews* test was updated to address private-party-initiated deprivations in *Connecticut v. Doehr*, 501 US —, 115 L.Ed.2d 1, 111 S.Ct. 2105 (1991).

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

KENDALL H. BREEDLOVE, Petitioner

v.

CALVIN W. PHILLIPS, *et al.*, Respondents

On Petition For A Writ Of Certiorari
To The Supreme Court of Virginia

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully submits this *Supplemental Brief in Support of Petition for a Writ of Certiorari*, pursuant to Supreme Court Rule 15.7. This supplemental brief arises from the decision of June 24, 1994, by this Court of *Dolan v. City of Tigard*, slip op., and the final *order* on June 24, 1994, by the Circuit Court of Arlington, Virginia, dismissing upon *demurrer* Petitioner's five-count suit for malicious prosecution, abuse of process, and civil conspiracy, arising from the instant false mechanics' liens.

STATEMENT OF THE CASE

1. *Breedlove v. Phillips, et al.*, on which the instant *petition for certiorari* was filed, contained 10 defamation counts arising from three false mechanics' liens filed in the false, fictitious, *feigned* name of, or claiming under the prior lien of, a not-in-life claimant—*Dennis Anderson*—with a false claimant address, for a false amount, with a perjured oath and forged signature. The Circuit Court of Fairfax County, Virginia, dismissed these 10 defamation counts upon *demurrer* on October 30, 1992, under the rule of *Donohoe Constr. Co. v. Mount Vernon Associates*, 235 Va. 531, 369 S.E.2d 857 (1988) (hereinafter *Donohoe*) granting absolute privilege to mechanics' liens as judicial actions, regardless of their being sham or their abuse of privilege, and pleaded as such.

2. *Donohoe* also establishes the Virginia judicial procedure for seeking redress of such false, libelous, malicious mechanics liens through the route of obtaining *Virginia Code §43-17.1* adjudications of the liens' invalidity, and then suing for malicious prosecution or abuse of process. Petitioner followed this route in the Circuit Court of Arlington, Virginia, concerning these instant liens. Petitioner successfully obtained two *§43-17.1* adjudications in the Arlington Circuit Court in February and April, 1993. Petitioner then brought a five-count suit at law in Arlington on July 15, 1993, styled *Breedlove v. Hart, et al.*, for malicious prosecution, abuse of process, and civil conspiracy, pursuant to the Virginia judicial procedure established in *Donohoe*, for the redress of libelous, or fraudulent, or malicious mechanics' liens, which was dismissed on *demurrer* on June 24, 1994. The constitutionality of this *Donohoe* procedure, for the redress of false, libelous, malicious mechanics' liens, is challenged in the instant *petition for certiorari.*

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. *Certiorari Should Be Granted Because This Case Provides the Basis for the Court to Propound a Standard for Judicial Use in Applying original and updated, Doehr versions of the Mathews test.*

1. The three-part *Mathews* test for constitutionality of Due Process afforded by a statute, regulation, ordinance, custom or usage, which was updated in *Connecticut v. Doehr*, 501 US —, 115 L.Ed.2d 1, 111 S.Ct. 2105 (1991) should be provided a *standard* for its application in Fourteenth Amendment deprivations, to guide judges in assessing Due Process provisions of various statutes, regulations, ordinances, customs or usages. The needed *standard* is described by the Petitioner as the **"rough parity of procedural burden."** Such a standard would be consistent with the "rough proportionality" standard for Fifth Amendment takings of *Dolan v. Tigard*, slip op., (1994).

2. The Petitioner's circumstances will serve as an example to demonstrate the derivation of this proposed *standard.* The Petitioner, in the underlying action, was deprived of significant property interests in his house in Arlington, Virginia, by: (a) an initial false, malicious mechanics' lien signed, sworn to, and filed in the false, fictitious, *feigned* name of a not-in-life claimant—*Dennis*

Anderson—with false claimant address, false amount, perjured oath, and forged signature; and (b) a second false, malicious mechanics' lien, in a *different* claimant name, claiming under the initial mechanics' lien and employing the initial *D. Anderson* false lien as true, also for false amount, contained within an alleged "certificate of partial release of mechanics' lien," without the requisite *affidavits* for legal holder status or for partial payment, required by *Virginia Code* §43-67 and its referenced *§55-66.3* and *§55-66.4* for the release of liens. Both liens were employed in an extortion attempt against the Petitioner. Each lien was filed without Due Process — without notice and without an opportunity for the lienee (the Petitioner) to be heard prior to the liens attaching.[1]

a. Plaintiff filed two chancery suits under *Virginia Code §43-17.1*, challenging the validity of each of these two mechanics' liens. In each instance, the Arlington Circuit Court ruled that each lien "is and was invalid," in orders of February and April, 1993.

b. The Arlington Circuit Courty rendered both *Virginia Code §43-17.1* decisions prior to the *Petition to Rehear* the *demurrer* in the Fairfax case (the instant action of this *petition*) for the 10 defamation counts. The Petitioner's memorandum in support of his *Petition To Rehear* in Fairfax, included quotations of the Arlington Court's holdings in the *§43-17.1* suits, that each lien "is and was invalid." Despite this support for the Petitioner's pleading of the liens being sham and absolute privilege being abused, the Fairfax Court denied the *Petition To Rehear*, leading to the instant appeal.

c. Until the final court order freeing the Plaintiff's liened Arlington property from *custodia legis*, 17 months had elapsed during which the Plaintiff was deprived of some of the sticks in the bundle of rights known as property, constituting deprivation of significant property interests by these liens.

d. Had the Petitioner not had the capability to pursue these two chancery suits *pro se*, the Petitioner estimates that his would-

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[1] "The right to prior notice and a hearing is central to the Constitution's command of due process." [*U.S. v. James Daniel Good Real Property*, — U.S. —, — L.Ed.2d. —, 114 S.Ct. 492, at 500 (1993).]

be-equivalent legal fees for the required *§43-17.1* litigation would have been about $40,000, allocated about $20,000 to each suit.

3. For the persons who filed these two false, invalid mechanics' liens against Petitioner, the burden of their predeprivation procedure to create these false liens was $13.00 for the initial false mechanics' lien and $10.00 for the subsequent lien, contained within an alleged "certificate of partial release of mechanics' lien," plus about one-half hour of time for preparing each lien. In addition, there would be a $1 notary fee for each lien to make the perjured oath in the *affidavit* of the memorandum.

4. For the Petitioner to undo these two false, invalid mechanics' liens, required the would-be-equivalent in legal fees of $40,000 and 17 months, during which time Plaintiff's liened Arlington property was seized and held in *custodia legis*.

5. Thus, in the Petitioner's circumstances, there was *not* "rough parity of procedural burden" upon the lienor and the lienee; their respective procedural burdens were lopsidedly imbalanced.

6. Principles of due process and equal protection under law, embodied in the concept "rough parity of procedural burden," dictate that the State should not favor unduly either side of a private dispute. **In the instant circumstances, there can be no dispute with a false, *feigned*, not-in-life, fictitious person and no assertion that a not-in-life, fictitious person has any *interest* in the Petitioner's property.** However, permitting malicious persons to create and maintain two liens on the Petitioner's property for $25 and an hour's time—in the name of a not-in-life fictitious person—which requires the equivalent of $40,000 in litigation and 17 months to undo these liens, is the equivalent of the State arming the lienor with a broadsword and arming the lienee with a penknife.

7. It became clear during the unfolding of the extortion attempt, that for their extortion to work, the malicious perpetrators counted on the tremendous difficulty for the lienee victim (the Petitioner herein) to free his properties from the liens. Having double-liened one of Petitioner's properties in Arlington, they then proceeded to double-lien another of Petitioner's properties in Prince William County, Virginia, and filed suit to enforce on the first, double-liened

Arlington property. Faced with the legal costs of defeating the false liens, the lienee (the Petitioner) would capitulate to the extortionary demands. Thus, four false mechanics' liens were involved, three of which were in the name of or claimed under the lien of a not-in-life fictitious person. The May 7, 1992 false lien against Petitioner liened a Prince William County property then belonging to another owner, clouding that owner's title.[1] The property had been sold and the deed recorded six weeks before the false May 7, 1992 lien was filed. The transfer was made in a conditional sale under a title insurance exception to the initial January 14, 1992 *Dennis Anderson* mechanics' lien, while still in *custodia legis*, but prior to the subsequent May 7, 1992 false lien. The Respondents perpetrated these two double-lienings after Petitioner advised them twice in writing of the false, illegal nature of the initial round of liens and twice verbally, in response to telephone demands for $50,000, that no such debt was owing.

8. Petitioner has now been engaged in 2 and 1/3 years of intense litigation, seeking redress for the damages caused by these liens, including the instant *petition* of one branch of the litigation to the United States Supreme Court. Petitioner now estimates that his would-be-equivalent legal fees for the litigation to date would approximate $475,000. The end result of this litigation is that **Petitioner's every cause of action for redress**—through common-law defamation, statutory defamation, slander of title, malicious prosecution, abuse of process, and civil conspiracy—**has been dismissed at the Virginia trial court level,** upon *demurrer*, before any cause of action or punitive damage claim could reach a jury.

9. Further elaboration of the proposed *standard* of "**rough parity of procedural burden,**" set forth by the Petitioner in paragraphs I. 1 and I. 5 above, involves the standard's interpretation. The proposed *standard*, "rough parity of procedural burden," as

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1 "The *ex parte* preseizure proceeding affords little or no protection to the innocent owner." [*U.S. v. James Daniel Good Real Property, id.*, at 502.] *Wallace v. Brumback*, 177 Va. 36, 12 S.E.2d 801 (1941) held: (a) Virginia mechanics' liens must name the owner of record, (b) it is incumbent upon a lien claimant to ascertain the name and address of the owner of record from the public records, and (c) the lien is void if it fails to name the owner of record.

applied to balancing predeprivation safeguards against postdeprivation safeguards or remedies, should be interpreted to mean either:

a. If the State makes it very easy to deprive someone of a constitutionally-protected interest, the State must make it equally easy to challenge and to undo an erroneous or malicious deprivation. For example, the lienee should be permitted to file a one-page, sworn "denial of mechanics' lien," for $13.00 fee, which releases the property from lien and shifts the burden of establishing the lien to the lienor, in a full judicial hearing before a judge, if the lienor wishes to pursue the lien.

b. Or, conversely, if the State makes it very difficult for someone deprived of a constitutionally-protected interest to challenge and to undo an erroneous or malicious deprivation, then the State must make it equally difficult for that deprivation to occur and must provide for remedy of lienee damages. For example, a full judicial hearing before a judge with a lien attaching only upon signed order from that judge, as in Hawaii and Maryland currently.

10. Within the procedural spectrum delineated in paragraphs I. 9a and I. 9b, above, many equilibrium points exist at which the rights and burdens of good-faith lienor and lienee may be in rough *parity*. There must also be equilibrium points where further balance, or *parity*, is achieved: where the burdens upon the *malicious* lienor are appropriately deterrent, while the burdens upon the wronged lienee are sufficiently light as to thwart extortionate use of state lien statutes. It is inappropriate, and unconstitutional, for the State to create constitutionally-defective laws and judicial procedures which are inadequate and which facilitate extortionate conduct.[1]

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[1] "...but the State may nevertheless violate the Constitution by failing to provide appropriate procedural safeguards. The Constitutional duty to provide fair procedures gives the citizen the opportunity to try to prevent the deprivation from happening, but the deprivation itself does not necessarily reflect any 'abuse' of state power. * * * In a procedural due process claim, it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation *without due process of law*—without adequate procedures." [*Daniels v. Williams*, 474 US 327, at 338-9, 88 L.Ed.2d 662, at 673, 106 S.Ct. 662 (1986).]

11. Thus, the *standard* for determining in a *Mathews* test if a particular set of circumstances is in such balance should be the "**rough parity of procedural burden,**" which goes to the heart of procedural due process.

12. Both the Virginia mechanics' lien law and the Virginia judicial procedure for the redress of false, libelous, malicious mechanics' liens, set forth in *Donohoe, supra,* fail to comport with the *standard,* "rough parity of procedural burden."

II. *Certiorari Should Be Granted Because the Establishment of a Standard for the Mathews Test Would Assist Judges in Evaluating the Import of Requirements for Bonds as Part of Due Process.*

1. In *Doehr, supra,* the plurality and the dissent addressed the question of whether Due Process required the posting of a bond by the lienor. Lienor bonds are part of *security safeguards against abuse* and of *remedial procedures.*[1] Related to this question is the issue of whether the State lien law permits the liened property to be freed from lien by substitution of a bond by the lienee. Lienee bonds are part of postdeprivation remedies.

2. The proposed *standard,* "**rough parity of procedural burden**" is quite useful in considering the issue of the lienee being able to free his property from lien by substituting a bond, and a related issue of the lienor being required to post a bond to protect against the damage of unwarranted deprivation by the lien.

3. Drawing upon the mechanics' lien laws of the fifty states, 39 states permit the substitution of a bond to free the property from mechanics' lien: 12 states prescribe a 200% bond, 10 states prescribe a 150% bond, 5 states prescribe bonds of 125-150%, 7 states prescribe 100% bonds, and 5 states prescribe various other bond surety amount requirements (see Exhibit 25, pp. A-53 to A-

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[1] A complete judicial *approach* consists of: (a) a *methodology*, (b) one or more *standards*, (c) *user-instructions*, (d) *update-guidance*, (e) *error-safeguards*, (f) *security-safeguards against abuse*, and (g) *remedial procedures* for error correction and for redress of damages. For more on this subject, see syllogistic system at Appendix Exhibit 1, section B, page A-2.

63, of the original *Petition for Certiorari*). Thus, a majority of those states (22 out of 39 states) permitting substitution of a lienee bond for a lien on property, prescribe a bond amount of 150% or more of the lien claim amount. The Virginia mechanics' lien law is one of the 11 states that does not provide that the lienee may free his property from lien by substituting a bond. Even had Virginia statute permitted "release by bond," the collateral requirements for the bond make the procedure impractical and unconstitutional. Such "release by bond" does not comport with the *standard*, **"rough parity of procedural burden."**

a. According to a Virginia bonding surety with whom the Petitioner discussed the problem, to obtain a 150% bond to satisfy the majority of state mechanics' lien lienee-bond requirements, the Petitioner would have had to pledge $2 *cash* for every $1 value guaranteed by the surety under the bond. Table 1 shows the cash requirements imposed upon the lienee to obtain a lienee bond for the Arlington house, sufficient to satisfy a 150% bonding requirement, prevalent in a majority of states permitting such bond.

Table 1. Cash Requirements to Satisfy Release by 150% Bond

Lien	Lien Amount	150% Bond Amount	Cash Collateral Amount	Bond Premium Fees	Total Cash Required
Nov. 27, 1991 lien	$51,768	$77,652	$155,304	$19,413	$174,717
May 22, 1992 lien	$13,014	$19,521	$39,042	$4,880	$43,922
Totals	$64,782	$97,173	$194,346	$24,293	$218,639

b. Thus, the mechanics' lienor being able to create one Virginia mechanics' lien for $13.00 filing fee, as compared to the Petitioner as a mechanics' lienee being unable to free his Arlington property from lien except through expensive litigation (*i.e.*, equivalent to $20,000 in legal fees for each lien-validity suit) in which the lienee must bear the burden of proving the *invalidity* of the lien (which is presumed to be valid); or, having to come up with $218,639 total *cash* for collateral and substantial non-refundable bond premium fees to secure one 150% bond to release the

Arlington property from the initial and subsequent liens—had Virginia had a statute equivalent to 22 other states permitting such a release by substitution of a 150% bond—does not comport with the *standard*, **"rough parity of procedural burden."**

c. In hostile, malicious, extortionate circumstances, as in the instant case, such purported avenue of release of property by lienee bond is instead a coercion—a lopsided and unconstitutional imbalance of procedural burden—facilitating extortion, because if the lienee is able to lift the *initial* mechanics' lien by providing a bond, he must still contend with any *additional* or subsequent lien which the malicious lienor may then file.

d. Furthermore, state mechanics' lien statutes generally provide that substitution of a bond for the liened property might only be employed for the release of a mechanics' lien *prior* to the lienor's filing of a suit to enforce. No such release by bond would be permitted after a suit to enforce was filed. Thus, *no* amount of cash—even the massive amounts in Table 1, above—could have secured the release of the Arlington property from the extortionary mechanics' liens and May 26, 1992, suit to enforce by Respondent Phillips, even had Virginia statutes permitted release by substitution of lienee bond.

4. If the lienor pursues the extortion, escape by the lienee-victim is impossible. The lienor just keeps filing false liens: as each one is lifted by the lienee posting a bond, another false lien takes its place; or, the lienor files suit to enforce, which makes it impossible to obtain any bond. It is such severe and unconstitutional imbalance of procedural burdens and costs, lopsidedly in favor of the lienor, which permits extortionate use of Virginia lien statutes. The lack of any deterrents against abuse and the lack of any viable redress procedures in the Virginia state mechanics' lien law *promotes* extortionate use of the Virginia lien statute and judicial procedure.[1]

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[1] Connecticut argued in *Connecticut v. Doehr, supra*, that its state statute for wrongful use of civil procedure, providing double and triple damage provisions was adequate postdeprivation safeguard against erroneous deprivation in prejudgment attachment, and obviated the need for predeprivation due

III. *Certiorari Should Be Granted Because the original and the updated, Doehr-version Mathews Test Addresses Only Erroneous Deprivations and Not Wilful or Malicious Deprivations and Requires Augmentation of Its Criteria To Do So.*

1. The three parts of the updated, *Doehr*-version, *Mathews* test consider the following *criteria*: (a) the private interests affected; (b) error control safeguards: (1) the predeprivation safeguards against *erroneous* deprivation, and (2) the postdeprivation safeguards against *erroneous* deprivation, including procedures for correcting the error; and (c) the interest of the private party seeking the prejudgment remedy with due regard for any ancillary interest the government may have and the impact upon the state of providing additional safeguards.

2. The three-part updated, *Doehr*-version, *Mathews* test **fails to consider** a *fourth* group of *criteria*—security safeguards against *malicious* abuse or perversion to unwarranted ends: (a) the predeprivation safeguards against *malicious* deprivation, including the procedures for deterring malicious abuse, and (b) the postdeprivation safeguards against *malicious* deprivation, including the procedures: (1) for swiftly setting right the malicious deprivation, and (2) for redressing the damages.

3. Supreme Court cases reveal an evolving judicial *approach* to Due Process and property; Federal and State cases show that the *Mathews* test and the updated, *Doehr*-version *Mathews* test are being applied, without consideration of *malicious* deprivation and without any *standard* to guide judges in balancing between predeprivation safeguards and postdeprivation safeguards and remedies, to determine constitutionally-required Due Process.[1] Further, these cases deal only with *erroneous* deprivation and fail to

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process. The United States Supreme Court disagreed with Connecticut's postdeprivation remedy of double or treble damages being an adequate safeguard. Clearly, the Supreme Court does not consider a pound of postdeprivation cure equal to an ounce of predeprivation prevention. Virginia has no wrongful use of civil procedure statute.

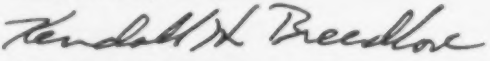
[1] See cases at Appendix Exhibit 1, p. A-3, note 1.

consider *malicious* deprivation or remedies for redress of damages caused by the deprivation.[1]

4. Because the *Mathews* test originated for testing the constitutional Due Process of Government-instituted deprivations, there was no substantive requirement to address *malicious* actions by the Government in the test. It can be assumed that the Government is not malicious in its actions. The same cannot be said about private-party-instituted deprivations.

5. Thus, the time is appropriate that the three-part *Mathews* test for the constitutionality of Due Process afforded by a statute, regulation, ordinance, custom or usage—updated in 1991 for private-party-instituted deprivations in *Doehr, supra*—should be augmented with a *fourth* part—considering security safeguards against *malicious* abuse or perversion to unwarranted ends: (1) the predeprivation safeguards against *malicious* deprivation, including the procedures for deterring malicious abuse, and (2) the postdeprivation safeguards against *malicious* deprivation, including the procedures: (i) for swiftly setting right the malicious deprivation, and (ii) for redressing the damages.

Respectfully submitted,



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Falls Church, Virginia 22042

August 30, 1994

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[1] "'The purpose of this requirement [*the right to prior notice and a hearing*] is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize **substantially unfair** or mistaken deprivations of property... .' *Fuentes v. Shevin*, 407 U.S., at 80-81, 92 S.Ct., at 1994-1995." [bold emphasis added by Petitioner to *U.S. v. James Daniel Good Real Property, id.*, at 500-501.]

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CERTIFICATE OF SERVICE

SS: COMMONWEALTH OF VIRGINIA
County of Fairfax, to-wit:

KENDALL H. BREEDLOVE, being first duly sworn, upon his oath deposes and says that he is filing *pro se*, and that on this 30th day of August, 1994, pursuant to Rule 29.5 (c) of the Supreme Court Rules, he mailed three copies of the ***Supplemental Brief in Support of Petition for Writ of Certiorari*** by first-class mail, postage pre-paid, to each of the Respondents, or their counsel, as follows:

Mr. Calvin W. Phillips, *pro se*,
Respondent,
310 Maple Avenue West, Suite 198
Vienna, Virginia 22180; and

Mr. J. Charles Curran, attorney of record for
Respondents Joyce E. Horton and James H. Horton,
Kidwell, Kent & Curran
9695-C Main Street
Fairfax, VA 22031; and

Pursuant to Rule 29.4 (c), citing that 28 USC §2403 (b) may be applicable, he mailed three copies of the ***Supplemental Brief in Support of Petition for Writ of Certiorari*** by certified mail, postage prepaid, on 30 August, 1994, addressed as follows:

The Honorable James S. Gilmore III
Attorney General of the Commonwealth of Virginia
Supreme Court Building
101 N. 8th Street
Richmond, Virginia 23219

Kendall H. Breedlove

Kendall H. Breedlove, *pro se*

SUBSCRIBED and Sworn to before me on 30th of August, 1994.

Notary Public

My commission expires: 10/31/95

VIRGINIA
FAIRFAX COUNTY.

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APPENDIX

Exhibit 1 (Case Evolution of Judicial *Approach* regarding the *Mathews* Test)

A. The Constitutional Philosophy Underlying the Cases' Evolution—

1. Most certainly, the drafters of the Constitution intended to secure American freedoms against wilful and, especially, malicious deprivations of constitutionally-protected interests. It is unlikely that the later drafters of the Fourteenth Amendment to the United States Constitution intended to protect the citizenry from only *erroneous* deprivations of those interests, while having no regard for willful or *malicious* deprivations of those same interests.

a. Consequently, it follows logically, that for a law to be constitutional, the law must prescribe safeguards to prevent wilful and malicious abuse or perversion of the law to unwarranted ends resulting in *malicious* deprivations of constitutional interests as well as to prevent the *erroneous* deprivations of those same interests.[1]

b. Hence, to be constitutional, procedural due process must provide safeguards against all three forms of deprivation: erroneous, wilful, and malicious. Additionally, the procedural due process must prescribe procedures for the swift correction of deprivation, whether erroneous or malicious, and remedial procedures for redress of damages. Without these security safeguards and remedial procedures, the constitutional interests of the citizenry cannot be protected adequately and erroneous or malicious deprivations of constitutionally-protected interests will ensue.

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1 "...but the State may nevertheless violate the Constitution by failing to provide appropriate procedural safeguards. The Constitutional duty to provide fair procedures gives the citizen the opportunity to try to prevent the deprivation from happening, but the deprivation itself does not necessarily reflect any 'abuse' of state power. * * * In a procedural due process claim, it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation *without due process of law*—without adequate procedures." [*Daniels v. Williams*, 474 US 327, at 338-9, 88 L.Ed.2d 662, at 673, 106 S.Ct. 662 (1986).]

c. And, to judge that constitutionality, a judicial *approach* must likewise address all three forms of deprivation, to fulfill the intent of the drafters of the Fourteenth Amendment.

2. There are certain basic freedoms related to life, liberty, and property which many men and women throughout the history of our country died to win and to protect, which we as Americans will not allow to be taken from us, not by malice, not by intent, not by mistake, without Due Process of law, and the citizenry will not tolerate an after-the-fact excuse of "Oops, I didn't know that was your freedom I was treading upon."

B. The Syllogistic System Underlying the Cases' Evolution—

1. The cases demonstrate a piecemeal, *ad hoc* approach rather than a systems approach to judicial constitutionality testing of Due Process.

2. Based on systems theory, a complete judicial *approach* consists of: (a) a *methodology*, (b) one or more *standards*, (c) *user-instructions*, (d) *update-guidance*, (e) *error-safeguards*, (f) *security-safeguards against abuse*, and (g) *remedial procedures* for error correction and for redress of damages. "*Approach*" is used herein to mean a solution to a group of legal problems; it is an encapsulation of a proven means for resolving constitutional questions associated with these type of legal problems which may be recommended safely to future generations for their guidance. The *approach* serves as a bridge, providing continuity with past tradition, custom, and *stare decisis*, which has been proven in the present, and may be handed down with recommendation to the future generations for their guidance in resolving similar problems and, equally, new problems the nature of which cannot be imagined today.

3. A judicial test is a *methodology*, which is one component of a complete judicial *approach*. A judicial test typically consists of several factors, which are actually *criteria* to be used by the judge for his evaluation. What may or may not be stated are the relative *weights* to be ascribed to these *criteria* used in the judicial test. In making the judicial evaluation, to what *criteria* should the judge

ascribe most importance or *weight* in the judge's decision? In the context of the *Mathews* test, the ultimate question is whether any amount of postdeprivation remedies make up for a lack of adequate predeprivation safeguards to prevent an erroneous or malicious deprivation from occuring in the first place. That is, is a pound of postdeprivation cure equal to an ounce of predeprivation prevention? Is procedural due process adequate?

C. Comparing Cases to the Syllogistic System Highlights Need to Recognize Safeguards in Law Against Wilful, Malicious Deprivations—

1. A law, regulation, ordinance, custom or usage lacking: (a) safeguards against error, (b) safeguards against malicious abuse or perversion to unwarranted ends, (c) remedial procedures for the swift correction of deprivation, either erroneous or malicious, and (d) remedial procedures for redress of damages, cannot be constitutional for it does not protect adequately the constitutional interests of the citizenry. It is constitutionally-deficient in procedural due process.

2. *Webster's New World Dictionary of the American Language*, 2d college ed., at 476, defines *error* in several ways as: "3. something incorrectly done through ignorance or carelessness; mistake ... 7. *Law* a mistake in judgment or proceedings of a court of record, usually prejudicial to the complainant." Thus, consideration of *erroneous* deprivation connotes a focus of inquiry on deprivation by mistake or negligence, and not a focus on wilful, or malicious deprivation.

3. Supreme Court cases reveal an evolving judicial *approach* to Due Process and property; Federal and State cases show that the *Mathews* test and the updated, *Doehr*-version *Mathews* test are being applied, without consideration of *malicious* deprivation and without any *standard* to guide judges in balancing between predeprivation safeguards and postdeprivation safeguards and remedies, to determine constitutionally-required Due Process.[1]

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[1] See *Mathews v. Eldridge, supra; Connecticut v. Doehr, supra; U.S. v. James*

4. The three-part *Mathews* test for the constitutionality of Due Process afforded by a statute, regulation, ordinance, custom or usage—set forth in 1976 for *Government-instituted* deprivations in *Mathews v. Eldridge, supra,* and updated in 1991 for *private-party-instituted* deprivations in *Connecticut v. Doehr, supra*—addresses *erroneous* deprivations and does not contain a *fourth* part to deal with *malicious* deprivations—security safeguards against *malicious* abuse or perversion to unwarranted ends: (a) the predeprivation safeguards against *malicious* deprivation, including the procedures for deterring malicious abuse, and (b) the postdeprivation safeguards against *malicious* deprivation, including the procedures: (1) for swiftly setting right the malicious deprivation, and (2) for redressing the damages.

5. a. In his dissenting opinion in *Connecticut v. Doehr, supra,* **Renquist, C.J.,** stated:

> "I agree with the Court, however, that upon analysis the deprivation here is a significant one, even though the owner remains in undisputed possession. 'For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause.' Ante, p. —, 115 L Ed 2d, at 14. **Given the elaborate system of title records relating to real property which prevails in all of our states, a lienor need not obtain possession or use of real property belonging to a debtor in order to significantly impair its value to him."** [*bold emphasis added by Petitioner to Connecticut v. Doehr, id.*, at 24.]

b. **Renquist's,** C.J., comment about the elaborate systems

Daniel Good's Real Property, supra, Dolan v. City of Tigard, slip op., (1994); *Wyatt v. Cole,* 112 S.Ct. 1827 (1992); *Reardon v. U.S.,* 947 F.2d 1509 (1st Cir., 1991); *Shaumyan v. O'Neill,* 987 F.2d 122 (2nd Cir., 1993); *New Brunswick Savings Bank v. Markouski,* 123 NJ 402, 587 A.2d 1265 (1991); *Keystone Builders, Inc. v. Floor Fashion of Virginia, Inc, et al.,* (W.D.Va., no. C. A. 93-0001-C [unpublished], July 29, 1993).

of title records prevalent in all the states underscores the importance of protecting those record systems—large information systems really—from error or abuse, and in so doing, protecting the property interests represented therein from erroneous or malicious deprivation.

D. Safeguarding Information Systems, including Legal Information Systems—

1. Constitutional property interests exist, in large measure, in the public land records, which are proof of property ownership, interests, encumbrances, and entitlements. Hence, to safeguard the information system of the public records is tantamount to protecting the constitutional property interests. The cases have not addressed this point or the following considerations.

2. A useful concept to draw upon for guidance is the concept of error control in information systems, because legal systems and particularly land records systems are large information systems. In information systems, the principle has been well proven that the attention which should be devoted to the prevention of an error is directly proportional to the potential impact of that error. Only routine efforts need be directed at preventing the occurence of a minor error, the effects of which are easily remedied. However, where the effects of an error are not easily or inexpensively remedied, or where the impact of the error may be catastrophic, extensive effort and safeguards are emplaced to prevent the occurence of that potential error.

3. One end of this spectrum may be seen in the "zero-defects" program of aerospace contractors in space programs, such as the journey of man to the moon. In law, the same attentiveness is given to preventing a person from being deprived of their life erroneously — because it cannot be undone.

4. It is well worth noting that large systems, be they information systems or aerospace systems, have two sets of procedures — to satisfy two distinct and separate needs: (a) the need to control inadvertent error and (b) the need to protect the system from sabotage, subversion, embezzlement, or other abuses

which are *malicious* in their intent. Although certain procedures may serve both functions, there remains the requirement for satisfying the two different safeguarding needs.

5. Also, large systems require *remedial procedures* for what to do in the event the error control procedures or the security procedures fail or are subverted — how are the resultant errors corrected; how is the damage set right?

6. Thus, a state law, regulation, ordinance, custom or usage which creates procedures for or within a legal information system, such as procedures for the creation of attachments, liens, notices of *lis pendens*, and other encumbrances upon property, within the context of the large information systems of the public land records, needs: (a) safeguards against error; (b) safeguards against malicious abuse or perversion to unwarranted ends; (c) remedial procedures for the swift correction of deprivation whether erroneous or malicious; and (d) remedial procedures for redress of damages. Without these safeguards and remedial procedures, erroneous or malicious deprivations of constitutionally-protected interests of property, liberty, and entitlements to due process, equal protection under law, and civil trial by jury, will ensue. Such a state law, regulation, ordinance, custom, or usage—lacking these necessary safeguards and remedial procedures—cannot be constitutional for it does not protect adequately these constitutionally-protected interests.

E. Comparing Cases to the Syllogistic System Highlights Needs—

1. Comparing the cases to the syllogistic system permits identifying voids in the law and highlights needed definition. In the instant action, the highlighted needs omitted by the cases are:

- Need to augment the *Mathews* test to address *malicious* deprivation,
- Need to propound a *Mathews* standard, and
- Need to publish post-*Doehr* cases of constitutional challenges to creditor remedies in Virginia.

2. *Cases Disclose Need to Augment Mathews' Test—*

a. If it be that any constitutional state law, regulation, ordinance, custom or usage requires certain security safeguards and remedial procedures, then any judicial *approach* which seeks to evaluate the constitutional impact of a state law, regulation, ordinance, custom or usage which creates procedures for or within a legal information system, such as procedures for the creation of attachments, liens, notices of *lis pendens*, and other encumbrances upon real property, within the context of the large information systems of the public land records, needs to review and evaluate specifically these particular security safeguards and remedial procedures.

b. Various United States Supreme Court cases have either, upon initial consideration of an issue, posited a judicial test—a *methodology*—or, over time and use, have developed a judicial test.[1]

c. Reading of the cases in footnote one, below, discloses that oftentimes a *methodology* surfaces in a case, but after a number of other cases, it becomes apparent to the courts that a *standard* is lacking to provide consistency of results and repeatability. Thus, a subsequent decision will then propound the *standard* to accompany the *methodology*. Reading of similar cases spanning long periods of time (*e.g.*, many decades), discloses that the effects of societal change manifest themselves in the need to update an *approach*, usually by altering *criteria*, altering *weights*, or revising the *standard* (frequently by raising or tightening it).

d. These cases in footnote one, below, show that the

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[1] See *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969), *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972), *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974), *North Georgia Finishing v. Di-Chem, Inc.*, 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975), *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976), *Connecticut v. Doehr, supra*, (1991), *United States v. James Daniel Good's Real Property*, 114 S.Ct. 492 (1993), and, most recently, *Dolan v. Tigard*, slip op., (1994).

Mathews test and the updated, *Doehr*-version *Mathews* test are being applied, without considering *malicious* deprivation and without any *standard* to guide judges in balancing between predeprivation safeguards and postdeprivation safeguards and remedies, to determine constitutionally-required Due Process. Further, these cases deal only with *erroneous* deprivation and fail to consider *malicious* deprivation or remedies for redress of damages caused by the deprivation.

e. *Mathews v. Eldridge, supra,* set forth a three-part *methodology* in 1976 which was updated and employed in *Connecticut v. Doehr, supra,* in 1991. The three-part *Mathews* test for the constitutionality of Due Process afforded by a statute, regulation, ordinance, custom or usage when the government itself seeks to effect a deprivation on its own initiative was set forth in *Mathews v. Eldridge, supra,* and was *updated* to address testing for the constitutionality of Due Process afforded by a state statute enabling an individual to enlist the State's aid to deprive another of his or her property by means of prejudgment attachment in *Connecticut v. Doehr, supra.* The *updated* three-part *Mathews* test of *Doehr, supra,* gives consideration to: (1) the private interests affected; (2) the predeprivation safeguards against *erroneous* deprivation, and the adequacy of postdeprivation safeguards; and (3) the interest of the private party seeking the prejudgment remedy with due regard for any ancillary interest the government may have and the impact upon the state of providing additional safeguards.

f. *Connecticut v. Doehr, supra,* gives indication, both in the main opinion and in the dissent, that the criteria of the three-part *Mathews* test or *methodology* may require augmentation to make the test more broad based in its applicability. Not a "one size fits all" test, but a "one size fits more than one" test. Specifically, the questions of showing of exigent circumstances and posting a lienor bond as a remedy for redress of lienee injury were raised in *Doehr* by the plurality and by the dissent. The *weight* ascribed to two elements was stressed: *notice* and *an opportunity to be heard* were stressed as minimally-acceptable due process.

g. The dissent by **Renquist, C.J., and Blackmun, J.**, in *Connecticut v. Doehr, id.*, at 24, states:

> "Materialman's and mechanics' lien statutes award an interest in real property to workers who have contributed their labor, and to suppliers who have furnished material, for the improvement of the real property. Since neither the labor nor the material can be reclaimed once it has become a part of the realty, this is the only method by which workmen or small businessmen who have contributed to the improvement of the property may be given a remedy against a property owner who has defaulted on his promise to pay for the labor and the materials. To require any sort of a contested court hearing or bond before the notice of lien takes effect would largely defeat the purpose of these statutes."

(1) This dissent ignores the successful experience of Hawaii and Maryland with requiring prior notice, full predeprivation judicial hearing, and mechanics' liens attaching only upon a judge's signed order (*n.b.*, since Maryland's Supreme Court struck down its old mechanics' lien law in *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 353 A.2d 222 (Md., 1976)).

(2) Further, this dissent ignores the fact that the significant use of mechanics' liens is by large contractors on large commercial or office building programs, who are advised by prominent law firms, not by individual workmen or by small businessmen.

(3) Moreover, this dissent ignores the fact that the substantive problems for which mechanics' liens are employed commonly concern the non-payment of subcontractors by the general contractor, after the general contractor has been paid by the owner. It is inappropriate to hold hostage the owner's property as remedy for this situation. Rather, state laws should enforce requirements for payment by other means, including payment bonds.

h. Following *Doehr*, in 1993, *United States v. James Daniel Good's Real Property, supra*, addressed the question of a showing of exigent circumstances and whether an *ex parte* probable-cause hearing before a Federal magistrate, by the Justice Department, for the seizure of a convicted drug offender's four-acre property in

Hawaii, prior to a judgment of forfeiture, was a substitute for *notice* and and *an opportunity to be heard* as due process. *U.S. v. James Daniel Good Real Property, supra,* held that such *ex parte* hearing was not an adequate substitute for *notice* and *an opportunity to be heard,* before Mr. Good was deprived of some of the sticks in the bundle of rights known as property, prior to a judgment of forfeiture. Mr. Good's property was rented to tenants at the time of seizure and the Government did not displace those tenants, but merely had them pay rent to the Government. "The seizure deprived Good of valuable rights of ownership, including the right of sale, the right of occupancy, the right of unrestricted use and enjoyment, and the right to receive rents." [*U.S. v. James Daniel Good Real Property, id.*, at 501.][1]

i. In 1994, *Dolan v. City of Tigard, supra,* addressed the subject of the two-part *methodology* of *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677, 107B S.Ct. 3141 (1987) for use in in Fifth Amendment takings: (a) does an "essential nexus" exist between a legitimate state interest and the permit condition; (b) if so, do the degree of exactions demanded by the permit conditions bear the required relationship to the projected impact of the proposed development. [*Dolan v. Tigard,* slip op., at 10-11 (1994).] Furthermore, *Dolan, supra,* set forth the *standard* to be used for assessing that required relationship as to Fifth Amendment takings: a "rough proportionality." [*Id.*, at 16.]

j. *Dolan v. City of Tigard, supra,* provides certain *instructions for use.* For example, quoting from *Nollan, supra,* which quotes in turn from *Penn Central*, 438 U.S. 104 (1978), "'A use

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[1] "The court [*of Appeals for the Ninth Circuit*] was unanimous in holding that the seizure of Good's property, without prior notice and a hearing, violated the Due Process Clause. * * * We now affirm the due process ruling... ." [*U.S. v. James Daniel Good Real Property, id.*, at 498.] "The right to prior notice and a hearing is central to the Constitution's command of due process. 'The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantially unfair or mistaken deprivations of property... .' *Fuentes v. Shevin*, 407 U.S., at 80-81, 92 S.Ct., at 1994-1995." [*Ibid.*, at 500-501.]

restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial purpose.'" [*Dolan v. Tigard, id.*, at 13.] Also, to foster repeatability of results and consistency in the application of the *Nollan methodology*, the *user instruction* is set forth: "No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated." [*Id.*, at 16.] In considering the degree of exactions demanded, the Court stated: "The difference to petitioner, of course, is her ability to exclude others. As we have noted, this right to exclude others is **'one of the most-essential sticks in the bundle of rights that are commonly characterized as property.'** *Kaiser Aetna*, 444 U.S., at 176." [bold emphasis added by Petitioner to *Dolan, id.*, at 18.]

3. Cases Disclose Need to Propound Mathews' Standard—

a. Over the period 1991 – 1993, following *Doehr*, other courts have applied the updated, *Doehr*-version three-part *Mathews v. Eldridge* methodology. (See *Wyatt v. Cole*, 112 S.Ct. 1827 (1992); *Reardon v. U.S.*, 947 F.2d 1509 (1st Cir., 1991); *Shaumyan v. O'Neill*, 987 F.2d 122 (2nd Cir., 1993).) These cases demonstrate the need for the Supreme Court to state the *standard* to be used in evaluating the results of the *Mathews* test. The Petitioner notes in *Reardon v. U.S., supra*, that the United States Court of Appeals for the First Circuit has done an excellent job of extracting and stating the subcriteria implicit in the *Mathews* test; that is, of setting forth the *methodology* clearly. Even state courts have embraced the *Mathews* test. See *New Brunswick Savings Bank v. Markouski*, 123 NJ 402, 587 A.2d 1265 (1991), which applied a *Mathews* test and held that a levying creditor must provide actual notice of an execution sale to judgment creditors whose names and addresses are reasonably ascertainable; *Keystone Builders, Inc. v. Floor Fashion of Virginia, Inc, et al.*, (W.D.Va., no. C. A. 93-0001-C [unpublished], July 29, 1993), which applied a *Doehr*-version *Mathews* test to Virginia's prejudgment attachment statute, *Va. Code §8.01-533 et seq.*

b. Thus, the cases demonstrate that the time is appropriate

that the three-part *Mathews* test for the constitutionality of Due Process afforded by a statute, regulation, ordinance, custom or usage, which was updated in 1991 for private-party-instituted deprivations in *Connecticut v. Doehr, supra,* should be augmented with a *fourth* part—considering security safeguards against *malicious* abuse or perversion to unwarranted ends: (1) the predeprivation safeguards against *malicious* deprivation, including the procedures for deterring malicious abuse, and (2) the postdeprivation safeguards against *malicious* deprivation, including the procedures: (i) for swiftly setting right the malicious deprivation, and (ii) for redressing the damages.

c. The minimum elements of Due Process—notice and an opportunity to be heard [*Mullane v. Central Hanover B. & T. Co.*, 339 US 306, at 313, 94 L.Ed 865, at 873, 70 S.Ct. 652 (1950) and its progeny]—are important prior to a lien attaching, because the lien surfaces typically in a real estate title search; the Virginia general contractor's mechanics' lien *requires no notice* to the property owner.[1] One of these instant malicious liens against the Petitioner surfaced in a title search on Friday the 13th of March, 1992, on the morning of the Petitioner's real estate settlement.[2]

d. The unfairness of state procedures only providing release of falsely-liened property by a *Virginia Code §43-17.1* suit, or by procuring a lienee bond for ridiculous cash requirements in states permitting such release by bond—while trying to hold a real estate deal together at the 11th hour, due to lack of notice of the lien—demonstrates the imperative need for *predeprivation* due process

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[1] "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." [*Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, at 800, 77 L.Ed.2d 180, at 188, 103 S.Ct. 2706, at 2712 (1983).]

[2] The Petitioner's name and address were reasonably ascertainable and were included in the false mechanics' liens, yet no actual notice by mail or otherwise was given to Petitioner of the false liens' filing. The filing of the instant false liens affected Petitioner's property interest significantly and adversely.

safeguards, that prevent erroneous or malicious deprivation and deter abuse of the lien statutes, and makes clear the present lack in Virginia mechanics' lien law of "rough parity of procedural burden," and the clear need for a *Mathews* standard.

e. *Mullane* and its progeny fail to address the heightened importance of notice and an opportunity to be heard in circumstances of *malicious* deprivation, "to give the citizen the opportunity to try to prevent the deprivation from happening"[1] and to deter the malicious abuser of statutory law.

*F. Research Discloses Lack of Published Cases in Virginia of Recent Post-*Doehr *Constitutional Challenges to Creditor Remedies—*

1. This area of the law—mechanics' liens—needs the bright light of day shown upon it in judicial decisions published for the guidance of all, not hidden away, as though the proceedings of a star chamber.

2. Since the 1988 *Donohoe, supra,* case, courts in Virginia have demonstrated a predeliction not to publish cases which challenge the constitutionality of Virginia creditor remedies. And more particularly, since the 1991 decision of *Connecticut v. Doehr, supra,* in which this Court stated that state laws creating attachments, liens, and similar encumbrances on property are subject to the strictures of Due Process, cases brought in Virginia challenging the constitutionality of Virginia law, under theories arising from *Doehr,* have not been published.

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[1] *Daniels v. Willaims,* 474 US 327, at 338-9, 88 L.Ed.2d 662, at 673, 106 S.Ct. 662 (1986).

a. The Virginia Supreme Court has refused appeal and declined to publish at least three recent cases involving constitutional challenges to mechanics' liens under theories of *Doehr*.[1]

b. The United States District Court for the Western District of Virginia failed to publish its 7-page opinion memorandum, documenting its application of the updated *Doehr*-version, *Mathews* test, in a case challenging the Virginia prejudgment attachment statute under theories of *Doehr*.[2]

c. The Arlington Circuit Court refused to prepare and publish a memorandum of its opinion and decision in *Breedlove v. Hart, et al.*, (17th Cir., Arlington at law #93-872, [unpublished], 1994), when prayed for explicitly by written motion of the Petitioner in his *Petition to Rehear*, which contained challenges, with supporting evidence, to Virginia law and judicial procedure based on lack of Due Process, lack of Equal Protection under law, and denial of Civil Trial by Jury—the trial judge stating that, after a year of litigation of the matter, he did not have time. Petitioner has filed *Notice of Appeal* to the Virginia Supreme Court in *Breedlove v. Hart, et al.*, Arlington at law #93-872.

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1 *Federal Deposit Insurance Corp. v. Corman Construction, Inc., et al*, Va. record no. 921452, [unpublished] (1993), appealed from §43-17.1 hearing in Arlington Circuit Court, containing a constitutional challenge to the Virginia mechanics' lien law: refused appeal by Virginia Supreme Court; *American Security Bank, et al. v. Dempsey Supply Corp.*, Va. record no. 930590, [unpublished] (1993), appealed from §43-17.1 hearing in Fairfax Circuit Court, containing a constitutional challenge to the Virginia mechanics' lien law: refused appeal by Virginia Supreme Court; *Breedlove v. Phillips, et al.*, Va. record no. 931104, [unpublished] (1994), the instant action, appealed from dismissal of suit for damages in Fairfax Circuit Court, subsequent to two successful §43-17.1 hearings invalidating two mechanics' liens, containing a constitutional challenge to the Virginia mechanics' lien law: refused appeal by Virginia Supreme Court.

2 *Keystone Builders, Inc. v. Floor Fashion of Virginia, Inc, et al.*, (W.D.Va., no. C. A. 93-0001-C [unpublished], July 29, 1993), quoted in *American Security Bank, et al. v. Dempsey Supply Corp.*, S.Ct. No. 93-236, Suppl. Brief to Pet. for Cert., Appendix, pp. 1a – 7a, Sept. 15, 1993; *cert. denied* 114 S.Ct. 305 (1993). Also cited in *Commonwealth Land Title Ins. Co. v. Corman Construction, Inc., et al.*, S.Ct. No. 92-1871, Suppl. Brief to Pet. for Cert., p. 2, Sept. 15, 1993; *cert. denied* 114 S.Ct. 70 (1993).

3. In a series of court actions, one single plaintiff (the Petitioner) has explored by litigating in Virginia every possible branch of any common-law route to redress for the false, libelous, malicious mechanics' liens which presented itself as being even vaguely possible. This search for redress included specifically the purported route of redress set forth in *Donohoe*, that is: prosecute successfully *Virginia Code §43-17.1* chancery suits, to obtain adjudication of the false liens' invalidity as proof of favorable termination of the underlying malicious prosecution, then procede in actions for malicious prosecution or abuse of process. The end result of the Petitioner's series of litigation is that **Petitioner's every cause of action for redress**—through common-law defamation, statutory defamation, slander of title, malicious prosecution, abuse of process, and civil conspiracy—**has been dismissed at the Virginia trial court level**, upon *demurrer*, before any cause of action or punitive damage claim could reach a jury.

4. The failure of Courts in Virginia to publish cases challenging the constitutionality of Virginia creditor remedy statutes—particularly mechanics' liens—and to refuse to hear three known appealed cases, including the Petitioner's case, challenging the constitutionality of Virginia's mechanics' lien law under theories arising under *Doehr*, highlights the need for this Honorable Court to grant *certiorari* for this instant action and to review the Due Process provided by the Virginia mechanics' lien law as it relates to false, libelous, malicious mechanics' liens and by the Virginia judicial procedure under *Donohoe*, for the redress of false, libelous, malicious mechanics' liens.